

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Preemption of Article 52 of the	)	MB Docket No. 17-91
San Francisco Police Code Filed by the	)	
Multifamily Broadband Council	)	

To: The Commission

**REPLY COMMENTS OF CAMDEN PROPERTY TRUST**

Camden Property Trust ("Camden" or the "Company"), by its attorneys, submits these Reply Comments in response to the April 4, 2017, Public Notice seeking comment on the February 24, 2017, Petition for Preemption of Article 52 of the San Francisco Police Code filed by the Multifamily Broadband Council ("Preemption Petition").<sup>1</sup>

**BACKGROUND**

Camden's Comments supported preemption of Article 52 because the San Francisco ordinance mandates the shared use of existing wiring in MDUs, noting that voice, video and high speed Internet access are increasingly delivered to residential units over a single home run wire and that mandatory sharing raises significant impediments to service quality and service provider responsibility. Camden also confirmed that its residents receive the full benefits of the Commission's bulk billing policy, noting that high speed Internet access service offerings at speeds that are *multiplies* above the Commission's advanced telecommunications capability speed

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<sup>1</sup> *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, Public Notice, DA 17-318 (MB April 4, 2017). *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, Order, DA 17-356 (MB April 13, 2017) (extending due dates for filing Comments and Reply Comments).

benchmark of 25 Mbps/3 Mbps for fixed broadband services,<sup>2</sup> as well as robust digital-tier, high-definition multiple-channel video programming services, are available to residents upon move-in, without services provider credit checks or deposits, at rates substantially lower than standard retail rates for the same services generally available in the local community. Its Comments outlined how these benefits would be undermined if Article 52 is not preempted, noting that denial of or inaction on the Preemption Petition could encourage other jurisdictions to enact similar, short-sighted ordinances and regulations that will impede future investments by services providers and property owners in advanced in-building infrastructure that enables the delivery of robust broadband services to MDU residents.

## **DISCUSSION**

### **A. The Comments Confirm That Article 52 is Ill-Conceived and Adverse to the Investment in Advanced Wiring Infrastructures and the Reliable Delivery of Robust Broadband and Video Entertainment Services to Consumers in MDU Communities**

Broad-based support for the Preemption Petition stems from the plain meaning of Article 52 that compels the shared use of existing wiring installed in MDUs for the provision of video services, high speed Internet access services, and voice services.<sup>3</sup> Many small competitive services providers, MDU owners and operators (including the Company), trade associations representing MDU property owners, and NCTA, The Internet & Television Association

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<sup>2</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket NO. 15-191, 2016 Broadband Progress Report, 31 FCC Rcd at 699, para. 50 (2016).

<sup>3</sup> National Multifamily Housing Counsel (“NMHC”) Comments, pp. 1-2, NCTA Comments, The Internet & Television Association (“NCTA”), pp. 1-2. Under Article 52 §5200, existing wiring means both home run wiring and cable home wiring, owned by the property owner, as those terms are defined in Sections 76.800(d) and 76.5 (II) of the Commission’s rules. In Section B, below, Camden addresses the arguments that Article 52 does not compel or mandate the shared use of existing wiring.

(“NCTA”), explained that mandated shared access to existing wiring is problematic from countless perspectives, including the obvious conflict with the Commission’s bulk billing policy that is premised on the property owner agreeing to pay negotiated rates for services to each residential unit at the property whether every unit is occupied or not.<sup>4</sup>

Property owners and services provider representatives emphasized that Article 52 and similar state and local laws that may be adopted pose service quality and reliability risks and undermine accountability for service quality and wiring maintenance.<sup>5</sup> Parties explained the adverse impact of Article 52 on investment in sophisticated in-building wiring infrastructure.<sup>6</sup> Competitive services providers stressed the value of bulk service arrangements in securing financing to extend service to MDUs serving low and middle-income residents and families.<sup>7</sup>

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<sup>4</sup> *Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd at 2460, para. 11 (2010) (“*Bulk Billing Order*”).

<sup>5</sup> Camden Comments, p. 4 (“True facilities-based services providers outright refuse to replace or upgrade wiring in shared wiring environments, particularly, if other providers can access and use the wiring without participating in the capital investment”). Avalon Bay Comments, p. 4 (“We commonly grant exclusive use of a specific wiring run to our providers. In return, they agree to maintain, repair, replace, and upgrade the wiring as needed”). NCTA Comments, p. 2 (“Based on past experience, cable operators also are concerned about technical issues that can arise when two or more facilities-based providers attempt to serve a single customer over the same wiring”). NMHC Comments, p. 9 (“Service providers required to share infrastructure will also limit their responsibility for maintenance, repair, replacement and upgrade of the home run cable”). NMHC Comments, Ex. E. Declaration of Matt Duncan, Director of Ancillary Services and Retail Management, Monogram Residential Trust, ¶ 3 (shared access to home run wiring gives rise to frequent disconnections, interference and improper splicing requiring replacement of a home run).

<sup>6</sup> See e.g., NCTA Comments, p. 3 (“An important element of the negotiation between a service provider and a building owner will often be the deployment (or upgrading) of wiring within the building. The use of high-quality wiring within the building is critical to delivering state-of-the-art broadband services, but deploying new wiring or upgrading existing wiring is a significant expense.”); NMHC Comments, p. 13 and Ex. B, Declaration of Richard Holtz, CEO, InfiniSys, Inc. ¶ 6 (“if providers are not given exclusive use of a dedicated home run cable, they will not agree to install that cable at their own expense or reimburse the MDU owner for a substantial part of the installation expense. Providers are naturally reluctant to pay for infrastructure that can be used by other providers who did not participate in the installation costs”). NMHC Comments, Ex. D. Declaration of Scott P. Casey, Senior Vice President, Business Development and Chief Technology Officer, Education Realty Trust, ¶ 4 (“Casey Declaration”).

<sup>7</sup> See e.g., DirecPath, LLC Comments (“By raising the barriers to investment in smaller, older, and low income MDUs, Article 52 makes it harder for DIRECPATH to contribute to narrowing the Digital Divide”).

Parties also highlighted that MDU residents will be unpleasantly surprised to learn that, when an incoming provider connects its broadband service to residents' home run wiring, they will lose any voice and video programming services they expected to continue receiving from the existing services provider.<sup>8</sup>

State and local laws based on mandatory access to infrastructure or inside wiring dedicated to and often financed by another services provider are inconsistent with the Commission's goals and policies looking to spur broadband investment.<sup>9</sup> As a better path, several parties identified market-based solutions that should be encouraged. For example, Camden installs multiple pathways in properties through which other services providers can extend inside wiring dedicated for the provision of their services.<sup>10</sup> Another nationwide MDU owner and developer engages in a similar practice of installing "multiple home runs of cabling to ensure each provider has exclusive use of the wiring specifically designated for its use."<sup>11</sup> NMHC noted that in San Francisco, many properties are currently served by multiple services providers.<sup>12</sup> These practices are consistent not only with the letter, but the spirit of the Commission's prohibition against exclusive access agreements between MVPDs and property

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<sup>8</sup> See e.g., NCTA Comments, p. 4. ("A customer that chooses a new provider for Internet access service, for example, may be surprised to find that their existing video service was disconnected when the alternative Internet service was installed"); Casey Declaration, ¶ 6 (noting the unique challenges with service disconnects posed in student housing MDUs in which bulk billing arrangements are particularly important in providing high capacity broadband service to student residents).

<sup>9</sup> See e.g., *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Inquiry, Public Draft of Meeting Item, available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0601/DOC-345161A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0601/DOC-345161A1.pdf). Tentatively planned for consideration at the June 2017 Open Commission Meeting, Tentative Agenda, available at <https://www.fcc.gov/news-events/events/2017/06/june-2017-open-commission-meeting>.

<sup>10</sup> Camden Comments, pp. 4-5.

<sup>11</sup> Avalon Bay Comments, p. 3.

<sup>12</sup> NMHC Comments, p. 6.

owners.<sup>13</sup> These practices promote competitive access without jeopardizing the technical integrity and service quality of current and prospective services providers. As noted by several parties, Article 52 will discourage property owners from making these investments that support true facilities-based competition.<sup>14</sup>

**B. Supporters of Article 52 Misconstrue and Misinterpret its Plain Meaning, Straining to Argue the San Francisco Ordinance Does Not Conflict with the Commission’s Inside Wiring Rules and Bulk Billing Order**

The California Association of Competitive Telecommunications Companies (“CALTEL”), the City and County of San Francisco (“San Francisco”) and the Fiber Broadband Association (“FBA”) maintain that Article 52 does not create the potential for (i) conflicts over wiring access and maintenance through mandatory shared use of existing wiring, or (ii) disruptions due to the disconnection of existing services when a second provider accesses existing wiring.<sup>15</sup> These parties interject words, phrases and concepts into the ordinance to support the proposition that the authorized taking of existing wiring under Article 52 presents no risk of service interference or interruptions. These efforts do not withstand scrutiny.

Fundamentally, apart from its definition, the term "existing wiring" is referenced or identified in three (3) provisions of Article 52, all of which provide an unequivocal right of access to existing wiring in MDUs.<sup>16</sup> To try to skirt the interference and disruption issue, these

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<sup>13</sup> *Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (“2007 *Exclusive Service Contracts Order*”).

<sup>14</sup> See e.g., Casey Declaration, ¶ 4”. Camden Comments, p. 5.

<sup>15</sup> San Francisco Comments, pp. 9, n. 4; CALTEL Comments, pp. 3, 17-19 and 23; and FBA Comments, pp. 2-3, 22-24, n. 89.

<sup>16</sup> Article 52 of the San Francisco Police Code, Ordinance No. 250-16, stating that Section 5201(b) prohibits, without exception, property owner interference with a resident’s choice by "refusing to allow a communications services provider to...use any existing wiring to provide services as required by this Article 52." Section §5203 states that Article 52 requirements trump any contractual arrangement between the owner and an existing service provider. Section 5206(b)(3) provides a qualified limitation allowing a property to prohibit a provider's access to the property if the "property owner can show that physical limitations at the property prohibit the communications services provider from installing the facilities and equipment . . . necessary to provide communications service

parties look to §5206(b)(5)(C). This section allows the property owner to decline access to a provider where the "communications services provider's proposed installation of facilities and equipment in or on the property would have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property." This provision does not speak to or include any reference to access to "existing wiring" or to the potential adverse impact on existing services provided over that wiring, but refers to some undefined threshold at which the taking of existing inside wiring within an MDU adversely impacts the business case of the existing services provider(s). The MDU owner has no basis to object to or challenge the prospective services provider's demand for access.

Despite the absence of meaningful limits, conditions, or exceptions to an incoming provider's right to take existing wiring in Article 52, these parties read into, speculate, or identify limitations on mandatory shared access that are not within the four corners of the ordinance. They speak of an owner's right to deny an incoming provider's right to use existing wiring "where it is not feasible," "not technically feasible," or where it "would adversely affect existing services."<sup>17</sup> They say that the incoming provider's right can be exercised "if and only if the existing wiring is idle or an existing service using the wiring is being disconnected and replaced with a new service."<sup>18</sup> They say that incoming providers can only use existing wiring "that may otherwise lie fallow."<sup>19</sup>

In light of these unfounded assertions regarding limits on mandatory access to existing wiring, Article 52 places MDU owners in the untenable position of either granting shared access

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and/or from using existing wiring to provide such services." This qualified limitation goes to physical limits at the *property*—not to interference or disruption incident to the incoming provider's use of existing wiring (Article 52).

<sup>17</sup> San Francisco Comments, pp. 9, 23, and fn. 41.

<sup>18</sup> CALTEL Comments, p. 19; *see also* pp. 3 and 23.

<sup>19</sup> FBA Comments, p. 24.

to the building's existing wiring and enduring the operational challenges and financial risks discussed above, as well as having to deal with surprised and disgruntled residents, or facing the risk of a civil enforcement action by the City Attorney under §5210 or by a resident or incoming provider under §5211 if the owner declines to grant such access.<sup>20</sup>

### **C. Preemption of Article 52 is Warranted Because Article 52 Conflicts with Long-Established Commission Rules and Policies**

The Comments filed by property owners, NMHC, services providers, and NCTA, as well as those filed by proponents of Article 52, confirm the conflict between the San Francisco ordinance and the Commission's cable inside wiring rules and its *Bulk Billing Order*. Preemption of Article 52 is warranted because of this conflict. Both the inside wiring rules and the *Bulk Billing Order* reflect the Commission's careful balancing of the interests of MDU owners and residents, existing (incumbent) services providers, and those of prospective services providers. Article 52 deliberately "re-balances" these interests, as well as undercuts the implicit principle in the Commission's deliberations on these issues that the shared use of existing wiring in MDUs is neither feasible nor prudent, as confirmed by parties submitting comments in support of the Preemption Petition.

As noted in the Preemption Petition, under Section 16(d) of the Cable Consumer Protection Act of 1992, Congress directed the Commission to "prescribe rules concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator within the premises of such subscriber."<sup>21</sup> Initial rules were adopted in 1993, but the Commission revisited the subject in 1997, adopting rules for the disposition of home run and

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<sup>20</sup> It is noteworthy that Article 52 places no obligation on the *incoming provider* to ensure that its use of wiring will not result in interference or disruption of services.

<sup>21</sup> 47 U.S.C. §544(j).

cable home wiring, respectively.<sup>22</sup> The Commission assessed and balanced the competing interests of existing services providers, MDU owners, residents and prospective services providers, establishing carefully drawn rules for the disposition of home run wiring for either the entire building or on a unit-by-unit basis and adopting another set of rules for the purchase of cable home wiring when the MDU owner terminates the video service provider's service for the entire building. Article 52's mandatory shared access of existing wiring substantially "resets" the Commission's balancing of these competing interests in favor of a small subset of prospective services providers, upsetting established industry practices upon which investment decisions and allocations of responsibilities for the installation, use and maintenance of inside wiring are based.

Article 52's conflict with the Commission's *Bulk Billing Order* is inescapable. Under a bulk billing arrangement, the services provider commits to offer service to every resident of the MDU and the MDU owner agrees to pay for the service to each residential unit in the property, whether occupied or not, typically at a significantly discounted rate. In 2007, the Commission considered the implications of bulk billing arrangements (and exclusive marketing agreements) in connection with the vexing issue of whether exclusive access agreements between MVPDs and MDU owners should be allowed, ultimately prohibiting exclusive access agreements as anti-competitive and inconsistent with Section 628 of the Communications Act,<sup>23</sup> deferring consideration of bulk billing arrangements and exclusive marketing agreements.

In 2010, the Commission determined bulk billing and exclusive marketing agreements were consistent with the public interest, observing that "[i]n the large majority of cases bulk

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<sup>22</sup> *Telecommunications Services—Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1998) ("*Inside Wiring Report and Order*").

<sup>23</sup> See *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1.



billing appears to lower prices, increase the volume of programing, encourage high quality and innovation and bring video, voice and data services to MDU residents.”<sup>24</sup> The Commission acknowledged that bulk billing arrangements are tied to the bulk services provider’s exclusive use of its wiring, noting that residents will still be able to obtain services from another provider, “assuming another [provider] has wired or will wire the MDU, if necessary.”<sup>25</sup> The Commission explicitly balanced the potential benefits and harms of bulk billing arrangements, finding “[i]t would be a disservice to the public interest if, in order to benefit a few residents, we prohibited bulk billing, because so doing would result in higher MVPD services charges for the vast majority of MDU residents who are content with such arrangements.”<sup>26</sup>

Preemption of Article 52 is warranted, as set out in the Preemption Petition.<sup>27</sup> As with federal statutes, when Congress has delegated authority to a Federal regulatory agency, such as the Commission, and the Federal agency’s regulations and orders are issued pursuant to the statute, the Federal agency’s regulations have the same preemptive effect with respect to conflicting state and local law as the Federal statute. As noted above, the Commission’s inside wiring rules and *Bulk Billing Order* were based on the Commission’s balancing of the competing interests of various categories of services providers, MDU residents, and MDU owners. When a state or local law such as Article 52 demonstrably modifies—if not undermines—the Commission’s balancing of competing interests embedded in the Commission’s rules and orders, it is a prime candidate for preemption.

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<sup>24</sup> *Bulk Billing Order*, at 2463.

<sup>25</sup> *Id.* at 2465.

<sup>26</sup> *Id.* at 2471.

<sup>27</sup> Preemption Petition, pp. 21-32.

## CONCLUSIONS

The Commission should grant the Preemption Petition. Article 52 disrupts and disregards the balancing of competing interests of MDU residents, MDU owners, the existing services providers, and prospective services providers, as determined by the Commission in a series of related rules and orders with respect to the delivery of video, high speed Internet access, and voice services in MDUs. In light of the inside wiring rules and the *Bulk Billing Order*, MDU owners and a diverse universe of facilities-based services providers have negotiated investment decisions with respect to inside wiring in varied MDU environments and have defined responsibilities for the installation, operation, and maintenance of MDU inside wiring. Bulk billing arrangements support the deployment of infrastructure in a variety of MDU environments that provide true high-speed Internet access service and desired multi-channel video programming packages at favorable rates. True competitive access to MDUs is neither foreclosed nor prohibited, and is often accommodated by owners that install multiple home run wires or pathways for additional inside wiring or that allow an incoming provider to install new wiring.

Respectfully submitted,

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